MOTION FILED
MAY 2, 1983

No. 82-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF ALLEN PARK,
Petitioner,

vs.

ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE CONSTRUCTION COMPANIES IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc. and Rocco Ferrera & Company, Inc. ("the construction companies") request leave to file a brief amicus curiae in support of Respondents for the reason that this case is directly related to State of Michigan v City of Allen Park, 501 F Supp 1007 (ED Mich 1980) aff'd, 667 F2d 1028 (CA6 1981), cert. denied, 72 L Ed 2d 443 (1982). The construction companies were granted leave to file an amicus curiae brief in this case when it was briefed before the Sixth Circuit.

The State of Michigan case (in which the construction companies were plaintiffs and appellees) concerned the failure by Allen Park to timely complete a sewer separation project in violation of the applicable National Pollution Discharge Elimination System (NPDES) Permit issued by the State of Michigan. The district court entered an order requiring

Allen Park to Proceed immediately with the financing and construction of its segment of the project. See State of Michigan v Allen Park, 501 F Supp 1007 (ED Mich 1980).

The present petition relates to Allen Park's most recent challenge to the apportionment hearings held relating to requiring Allen Park to finance its share of the sewer separation project ordered in State of Michigan, supra. Completion of legal challenges to the apportionment proceeding is necessary before construction can start. Bonds cannot be sold to finance Allen Park's local share of the project costs while the present case is pending.

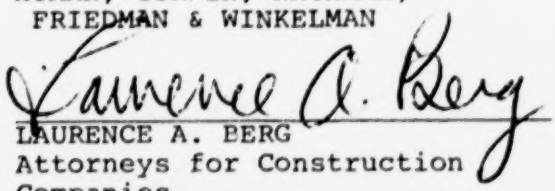
On July 15, 1981 Judge Feikens issued his Opinion, 518 F Supp 1079 (ED Mich 1981). The Opinion refers to and inextricably relates to the State of Michigan case. Construction cannot start until financing is resolved. Resolution of financing problems relates to the type of construction required and the time for construction.

The construction companies have been directly involved, for over three years, in issues relating both to the construction and financing of the new separation project. The construction companies request the opportunity to address the issues Allen Park raises in its petition. Because of the construction companies' familiarity with the history of the litigation and the practical considerations governing the construction and financing of the sewer separation project, it is respectfully submitted that they can provide this Court with relevant information.

WHEREFORE, the construction companies request permission to file the following brief amicus curiae.

Respectfully submitted,

HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN



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INTEREST OF AMICUS

The construction companies[1] were low bidders on contracts to construct segments of a sewer separation project in the City of Allen Park, Michigan. Petitioner, Allen Park, asserts the District Judge improperly refused to recuse himself in the case here which challenges the percentage of costs Allen Park is to pay for the project.

In a related predecessor suit, State of Michigan v City of Allen Park, 501 F Supp 1007 (ED Mich 1980), aff'd 667 F2d 1028 (CA6 1981), cert. denied, 72 L Ed 2d 443 (1982, the construction companies were plaintiffs with the State of Michigan and the Administrator of the United States Environmental Protection Agency. In the related predecessor suit, the Sixth Circuit stated that the district court

> ". . . held that the failure by Allen Park timely to complete the sewer separation project . . .

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[1] These companies are Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc., and Rocco Ferrera & Company, Inc.

> violated the applicable National Pollution Discharge Elimination System (NPDES) permit issued by the State of Michigan. The Court entered an order requiring Allen Park to proceed immediately with the financing and construction of its segment of the project." October 8, 1981 Order (No. 80-1554, CA6).

Amicus in this brief comments on the recusal argument of Allen Park and also reviews the project history documenting years of delay in abating a serious pollution and health problem.

SUMMARY OF ARGUMENT

Allen Park's motion for recusal was properly denied. There has been no abuse of discretion here.

Other communities have paid for and built their portion of the total pollution abatement project. Allen Park's refusal to pay its share of project costs, results in the continuing discharge of raw, sanitary sewage and undermines the effectiveness of the part of the project already built.

ARGUMENT

A Recusal Was Properly Denied

Judge Feikens denied Allen Park's 28 USC 455(a) recusal motion. Two grounds were asserted in support of the motion. First, Allen Park argues the trial judge was biased because of the following statement made about Mr. Moon, one of the counsel for the drainage district:

> "THE COURT: I am satisfied, looking back at the role that you [Mr. Moon] did have, and I am satisfied that no matter what the situation was, if you didn't think I could properly act you would have advised me, notwithstanding whatever the result of that would have been." (A 79)

Citing Roberts v Bailar, 625 F2d 125 (CA6 1980), Allen Park urged Judge Feikens to recuse himself pursuant to 28 USC 455(a), which states:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Judge Feikens distinquished Roberts, a discrimination case, noting that there the trial

judge commented that a principal witness, the judge knew, would not discriminate. Here, Judge Feikens noted his comment was a general comment about counsel, not about a witness (A 82, 96). Judge Feikens also noted that in the then pending proceeding he was reviewing the apportionment record as an appellate court and not deciding credibility (A 91). Roberts was inapplicable.

Allen Park also urged recusal because the trial judge wrote a letter (A 39-40) to citizens of Allen Park. Those citizens had complained about the court's decision to order the pollution abatement project to go forward, allegedly without holding any hearings. The letter set forth a chronology of events obtained ex parte from Mr. Tiplady, one of the drainage district's counsel (A 62-63).

The letter is merely a response to citizen inquiry. The chronology of events obtained from Mr. Tiplady was to save the Judge the time of going through the voluminous testimony (A 94), in order to inform the citizens that

hearings were held before the court's decision.

The letter's final paragraph states:

> "What is important to note is that until recently the City of Allen Park, its officials and citizens have been actively working to obtain separation of the combined sewer system with a sanitary retention basin." (A 39)

The above statement merely accurately reflects the findings made by the district court in its published opinion in the pollution abatement case. See 501 F Supp, at 1009-1010 and 1017 n 10.

The court quoted part of the legislative history of P.L. 93-512, 28 USC 455 et seq. (A 92-93), in justification of denying the recusal motion. The part of the legislative history quoted bears repeating here, as it is applicable to this case:

> "While the proposed legislation would remove the 'duty to sit' concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> "At the same time, in

> assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of the litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.
>
> "Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disquality was an abuse of sound judicial discretion." 3 U.S. Cong. & Adm. News, at 6355 (93rd Cong., 2d Sess., 1974) (Emphasis in original.)

There has been no abuse of discretion here. Numerous cases have upheld denial of recusal motions on far more compelling facts. See, e.g., Bradley v Milliken, 620 F2d 1143, 1156-1157 (CA6 1980) (ex parte contracts);

Schultz v Newsweek, 668 F2d 911, 919 (CA6 1982) (defendant's news article favorable to judge); In Re International Business Machines Corp, 618 F2d 923, 927-932 (CA2 1980) (child-like innocence not required, sporadic flare-ups toward counsel); United States v Phillips, 664 F2d 971, 1000-1004 (CA5 1981) (ex parte contacts); Matter of Georgia Paneling Supply, Inc, 581 F2d 520, 522 (CA5 1978) (ex parte conference); In Re United States, 666 F2d 690, 695 (CA1 1981) (prior relationship between judge and defendant); United States v Coven, 662 F2d 162, 168 (CA2 1981) (knowledge of evidence from prior proceeding); Ma v Community Bank, 686 F2d 459, 472 (CA7 1982) (judge lived in Depere, Wis. same town as bank's attorney and knew the bank attorney had practiced law a considerable time); Huff v Standard Life Ins. Co., 683 F2d 1363, 1369-1370 (CA11 1982) (judge's previous affiliation with defendant's law firm no abuse of discretion); In Re Federal Skywalk Cases, 680 F2d 1175, 1183-1184 (CA8 1982) (ex parte telephone calls to

counsel asking if his client would serve as class representative, if a class was certified. Claim of bias must be evaluated in light of the full record and not an isolated incident)

B A Decade Of Severe Pollution Caused By The Discharge Of Raw Sanitary Sewage, In Part, From Allen Park's Combined Sewer System

The history of the pollution of the Ecorse Creek is a long one, plagued by delay in abating the pollution despite agreement by all involved that the discharge of raw sanitary sewage must be controlled.

In May 1969, the Michigan Water Resources Commission (WRC) studied the water quality problems of the Ecorse River together with a plan of correction. The study found that during wet weather, flows in the combined sewer system of the communities involved (including Allen Park) were high. As a result, untreated domestic sanitary sewage and storm-water runoff are discharged into the North and South Branches of the Ecorse Creek at various outlets, 501 F Supp, at 1009. The WRC study

confirmed in detail that the discharge of combined sewer overflows into the river was the prime cause of its "severely degraded condition," id. The specific pollutants are described by the trial court based on the expert testimony of witnesses Canale (University of Michigan Professor of Environmental Studies) and Michigan Department of Natural Resources (MDNR) experts Kilmer, Willson and Sprow. The pollutants found included fecal coliform, organisms associated with the human digestive tract, and also associated with waterborn diseases such as hepatitis and typhoid, id.

In November 1970, as a result of the WRC study, the MDNR ordered the communities within the Ecorse Creek Basin (including Allen Park) to correct pollution emptying into the Ecorse Creek and the Detroit River. As a result, defendant Charles N. Youngblood, the Wayne County Drain Commissioner, authorized a study of the combined sewer systems of the communities involved to find a solution to

the water quality problems. The ultimate result was the "Facility Planning Study: Pollution Abatement of Ecorse Creek, Element 2 -- Combined Sewer Areas, Final Plan (Wayne County Drain Commissioner, February 1977," Id.

C The Facility Plan, Alternative 1 -- A Means To Control The Pollution Is Approved By Allen Park, MDNR And EPA

The Facility Plan was required pursuant to federal regulation in order to qualify any project selected for federal grant aid under Title II of the Clean Water Act (CWA), Section 201, 33 USC 1281 et seq. The regulations[2] detail the contents of the Facility Plan (40 CFR 35.917-1), including an adequate assessment of the expected environmental impact. Public participation is required (40 CFR 35.917-5). A public hearing on the Plan was held on January 27, 1977, id.

Acceptance of the Facility Plan by implementing government units is specifically

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[2] 40 CFR 35.917 et seq. (1977).

required:

> "A facilities plan submitted for approval shall include adopted resolutions . . . of the implementing governmental units . . . providing for acceptance of the plan . . . ." 40 CFR 35.917-6.

Allen Park passed the required resolution on June 14, 1977, Id., at 1010. As the trial court noted, prior to passing this resolution, Allen Park had several times already formally expressed its approval of the Facilities Plan Alternative 1, id., at 1017 n 10. Alternative 1 of the Facilities Plan called for the cities of Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff, id., at 1009.

The regulations also required approval of the Facility Plan by both the United States Environmental Protection Agency (EPA) and MDNR, 40 CFR 35.917-7 and 40 CFR 35.917-8. The approvals were given and EPA and MDNR tendered Step III grants for federal and state financial assistance to implement the necessary construction program, id., at 1011.

The Facility Plan examined three alternatives on the basis of monetary cost, contribution to water quality goals, public acceptability, environmental impact and implementation capability, id., at 1009. Alternative 1 called for Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff. This alternative would provide for continuous treatment of domestic sanitary sewage at the Wayne County Wyandotte Wastewater Treatment Plant during all flow conditions and release only storm surface runoff to Ecorse Creek id. The other two alternatives examined are described by the trial court, id.

The Facility Plan recommended selection of Alternative 1. It was selected by the North Branch of Ecorse Creek Drain Improvement after a public hearing on January 27, 1977, id. Allen Park endorsed Alternative, id., at 1017 n 10.

On June 14, 1977 the City of Allen Park Council passed a resolution, id., approving

the financing of drain improvements and authorizing a petition to the Wayne County Drain Commissioner requesting drainage improvements pursuant to Chapter 20 of the Michigan Drain Code of 1956, as amended, Michigan Compiled Laws (MCL) 280.461 et seq. After petitions submitted by the cities of Allen Park, Dearborn Heights, Lincoln Park and Taylor, the County of Wayne and State of Michigan, and following statutory notice and public hearings, MCL 280.467, a Final Order of Determination was entered on October 19, 1977. This Order determined that the petition for a drainage project (referred to as the Ecorse Creek Pollution Abatement Drain No. 1) was sufficient and that the project was necessary for the public health and should be constructed, id. Allen Park, the other communities and the drain commissioner had taken the steps necessary under both federal and state law to implement the project selected in the Facility Plan.

D Allen Park"s Refusal To Pay Its Share Of Project Costs To Implement Alternative 1 Results In NPDES Permit Violation

Pursuant to CWA §202, 33 USC 1281 et seq., the EPA and MDNR tendered Step III grants for federal and state financial assistance to implement the required construction program, id., at 1011. The EPA was to provide 75% of the funding of the grant-eligibity portions of the project and MDNR was to provde 5% of such funding. The remaining 20% of the cost was to be allocated among the local units of government which had originally petitioned for the pollution abatement project -- Allen Park, Lincoln Park, Taylor and Dearborn Heights, id. Following statutory notice and a hearing on April 26, 1978, the drainage board for the Ecorse Creek Pollution Abatement Drain No. 1 confirmed a proposed apportionment of costs, id. An assessment roll was prepared which set Allen Park's apportionment cost at 52.9105% of the total local share amount of $20,040,981.76 to be assessed to

the cities, State and County, id. The drainage district board divided the construction project into 13 construction contracts for work in the four communities involved and advertised them for competitive bidding. Bids were received on all 13 contracts and opened on June 27, 1978, id.

The bids for the project were higher than the drainage board had originally estimated. In July 1978, based on the higher bids, Allen Park raised objections to the project. The other communities raised no objections. In August 1978, Allen Park filed suit against the drainage district for the Ecorse Creek Pollution Abatement Drain No. 1, the Drain Commissioner and Treasurer of Wayne County and the County of Wayne, in Wayne County, Michigan Circuit Court, seeking an injunction against the project, id. The objections raised in the suit were solely financial. No NEPA suit was filed. No attempt was made to exhaust state or federal administrative remedies as to the Facility

Plan or the NPDES Permit. This State court case settled when the parties, upon approval by the MDNR and EPA, agreed to divide the project into two segments, id.

Segment I of the divided project consists of Contracts 6, 7, 8, 9, 10, 11 and 12 and covers sewer separation and storm water control in the Cities of Taylor, Dearborn Heights and Lincoln Park, Michigan. Segment II consists of Contracts 1, 2, 3, 4, 5 and 13, and covers sewer separation, sanitary retention facilities and pumping facilities for the City of Allen Park, id. Segment II was the subject matter of the predecessor pollution abatement litigation. Pursuant to the state court suit settlement agreement, the drainage district awarded only Contract 6-11 and readvertised Contract 12, id. Federal and state grants were received for Segment I and work on that segment was substantially complete at the time of the court's opinion, November 1980, id.

Approval by the MDNR and EPA of the

segmentation was specifically conditioned upon the commitment of defendant Charles N. Youngblood, Wayne County Drain Commissioner, and the LeBlanc Tile Drainage District to complete Segment II by March 31, 1982, id. If Allen Park now succeeds in blocking construction of Segment II, the effectiveness of Segment I will be subverted. The EPA, MDNR and other communities have detrimentally relied on Allen Park's earlier endorsement of the project, id., at 1018.

On December 12, 1979, the pollution abatement litigation was commenced to compel Allen Park to pay its share of the project costs and to compel the project to be built as approved in 1977 by Allen Park, the EPA and MDNR, id., at 1012.

On July 1, 1980, a Final Order and Judgment was filed, id., at 1024, directing Allen Park to forthwith participate in the funding and construction of Alternative 1 pollution abatement project. On November 6, 1980, the trial court issued its Opinion,

concluding:

> "Because of Allen Park's refusal to proceed with financing its segment of the project, plaintiffs are entitled to injunctive relief compelling financing and construction of the Allen Park segment of the Element 2 Final Plan, a project determined necessary for the public

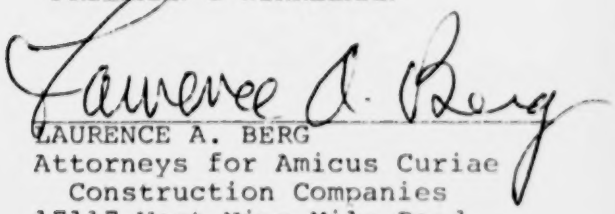
Clearly, the present apportionment case and this petition are pursued to further delay a project Allen Park demanded on June 14, 1977. Id., at 1010.

CONCLUSION

For the foregoing reasons, this court should deny petition for certiorari.

Respectfully submitted,

HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN



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Dated: April 21, 1983

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

I, LAURENCE A. BERG, being first duly sworn, certify that on April __, 1983 forty (40) copies of Motion For Leave To File And Brief For Amicus Curiae Construction Companies In Support Of Respondents were mailed by first-class mail, postage prepaid, to the Clerk of the United States Supreme Court, No. 1 First Street, N.E., Washington, D.C. 20543. The motions and briefs are submitted pursuant to Rule 36, Supreme Court Rules, within the time permitted by the Rules. I further certify that on April __, 1983 three (3) copies of the Motion For Leave To File And Brief For Amicus Curiae Construction Companies In Support Of Respondents were mailed by first-class mail, postage prepaid, to each of the following counsel of record at the addresses indicated:

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Subscribed and sworn to before me
this ___ day of April, 1983.

_____
Marjorie M. Helmling, Notary Public
Livingston County, Michigan
(Acting in Oakland)
My Commission Expires: 12/10/85